Haldane of Cloan, Richard Burdon
Haldane, 1st Viscount.

Federal Constitutions

Within the Empire.

SOCIETY OF COMPARATIVE LEGISLATION.

ADDRESS BY R. B. HALDANE, ESQ., Q.C., M.P.

ON

"FEDERAL CONSTITUTIONS WITHIN THE EMPIRE."

MAY 4, 1900.

FEDERAL CONSTITUTIONS WITHIN THE EMPIRE

AN ADDRESS DELIVERED BEFORE THE SOCIETY OF COMPARATIVE LEGISLATION

BY

R. B. HALDANE, Esq., Q.C., M.P.

AT A MEETING HELD AT THE ROYAL COLONIAL INSTITUTE, FRIDAY, MAY 4TH, 1900

LONDON
JOHN MURRAY ALBEMARLE STREET
1900

FEDERAL CONSTITUTIONS WITHIN THE EMPIRE.

[*An Address delivered before the Society of Comparative Legislation by* R. B. HALDANE, ESQ., Q.C., M.P., *at a Meeting held at the Royal Colonial Institute, on Friday, May 4th,* 1900.]

I HAVE written this paper with a somewhat selfish object. My purpose was to try to get plainly before my own eyes, quite as much as before the eyes of those who are so good as to come here to-day, certain phenomena pertaining to those derivative constitutions of our Empire which have been created by the Crown and by Parliament. The phenomena to which I refer arise out of and vary with certain relationships to the parent Government. These particular relationships are nowhere expressed in writing; but they none the less form part of the body of custom of the Imperial Constitution, and, like the rest of that body of custom, they are constantly, though slowly and silently, undergoing a process of modification and development. Just for this reason they are elusive and difficult to express. In this respect they resemble other principles of our unwritten and progressive Constitution, the statement of which, adequate and accurate for the generation in which it was made, has become untrue for the next. Such statements do not the less represent reality, because the reality is constantly changing.

We are, then, to endeavour to get some light on the nature of the unwritten relations of the Imperial Government to the derivative constitutions which have grown out of the parent stem, as these constitutions stand in the year 1900. The practical interest of the search is that with the consolidation of derivative constitutions upon so-called federal principles, which is beginning to be so much talked about, a new set of problems is emerging for solution. This process of consolidation began with Canada in 1867. To-day we are the witnesses of another instance of it of the most striking importance.

Let us start on our path of enquiry from a very obvious illustration. The form of the enacting clause of an Act of Parliament is framed thus: "Be it enacted by the Queen's Most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons in this present Parliament assembled; and by the authority of the same."

Suppose an intelligent stranger, knowing nothing of the realities of our system of government, were to sit down to its study and begin with this clause, what would he conclude? He would picture to himself the Queen sitting at Windsor or Osborne or Balmoral, evolving in the Royal mind what is called abroad a project of legislation. He would picture Her Majesty as then summoning, to begin with, the Lords Spiritual, the Bishops, and requesting first their advice and then their consent. He would next imagine a procession of the Peers Temporal to the Royal presence, and a similar council being held. And finally he would figure to himself, as a formality at the finish, the Commons being asked whether they had anything different to say. Now our stranger student would have drawn his inferences correctly enough. In them there would be only one shortcoming: his picture would be one of the English Government as administered, not by Queen Victoria, but by Henry VIII. and the other Tudors. The form has survived while the substance has changed.

There is a passage which admirably describes what that substance is to-day in a letter written by no less a personage than the Queen herself to the Emperor Napoleon III., in which she explains her constitutional position. I quote from the third volume of Sir Theodore Martin's *Life of the Prince Consort.* Her Majesty writes: "I am bound by certain rules and usages. I have no uncontrolled power of decision. I must adopt the advice of a council of ministers, and these ministers have to meet and agree on a course of action, after having arrived at a joint conviction of its justice and utility. They have, at the same time, to take care that the steps which they wish to take are not only in accordance with the best interests of the country, but also such that they can be explained to and defended in Parliament, and that their fitness may be brought home to the conviction of the nation." As the outcome of a slow process, the Sovereign has ceased to govern, and now only reigns. In England this was brought about chiefly by the control of the Parliament over Supplies. This is not necessarily so, nor has it always and everywhere been the case.

In other parts of the Queen's dominions it is through different means that a similar result has come about. The Channel Islands are the remaining portion of the territories of that Duchy of Normandy which King John lost. The kings and queens of our country have held them as dukes and duchesses of Normandy. The people of the Channel Islands have succeeded in establishing the right of constitutional government in their islands. It is true that the question whether the Crown can properly claim to legislate there by Order in Council without the advice and consent of the States or local Parliaments was nominally left open in the great case which was heard before a Special Committee of the Privy Council in 1894, and in which a pile of constitutional documents was brought together, of which it is surprising that no historian should

as yet have given any account beyond the rather meagre one in a late volume of State trials. But practically the Privy Council, in recalling the obnoxious Order in Council upon minor grounds, intimated to the home advisers of the Sovereign that never again ought the larger and more interesting claim to be brought forward. It may therefore be safely assumed that, for example, in Jersey, not less than in Great Britain, the Queen reigns without governing. I was of counsel in that case, and had to study a series of documents commencing at a date a century before the Conquest, and I remember being struck with the difference between the ways in which this result had been attained in England and in the Channel Islands. Here the concession has by degrees been wrung from the Crown as the price of financial assistance. There it was by degrees obtained as the reward for assistance in the various wars with France. The charters and other documents, which disclose the story of the process, were laboriously collected and arranged in several bulky volumes, which are none the less worthy of the attention of an enterprising historian because they repose in a lumber-room at the Privy Council office, covered with dust and neglect.

Another more familiar, but not less instructive, instance of the binding force of an unwritten restriction which has slowly come into existence is the constitutional impotence of the House of Lords, or any other upper chamber subject to the usages of the British Constitution, to amend a Money Bill. The House of Lords has full legal power to make such an amendment, and every court would be bound to take cognisance of and give effect to it. But as the result of the development of our Constitution amid a succession of struggles over the Commons' claim to the exclusive title to grant Supply, the Lords have become bound hand and foot by chains which are not the less real because they are invisible to the legal eye.

It is just this type of unwritten restriction on powers which theoretically are perfect from a legal point of view that I want to say something about this afternoon in connection with the various forms of Colonial Constitution—something very imperfect, for the subject is new, but something of which the reality is becoming in each generation more clearly recognised by the statesmen who have to administer the Colonial Office under successive governments. To the modern student of constitutional development in Colonial Government it is, for instance, astonishing to read such despatches as were very properly written thirty years ago by the first Governor of Queensland, Sir George Bowen, a man of real ability, and to reflect that they were written with the full assent not only of the Duke of Newcastle, the Colonial Secretary of the day, but apparently of the people of Queensland. Sir George claimed, among a multitude of other rights which now seem to us very odd, a constitutional right to revise the decisions of his ministers about such

matters as appointments to public offices. A claim like this may have been, and possibly was, constitutionally correct in those days. But since 1860 a great evolution has taken place in the position of a Colonial Governor. It is still true that he is freer to act on his own initiative than is the Sovereign at home, who has delegated to him his powers. If he has none of the divinity that doth hedge round a king, if, as was established by the Privy Council in such cases as *Hill* v. *Bigge* (3 Moore P.C. 465), *Cameron* v. *Kyte* (3 Knapp 332), and *Musgrave* v. *Pulido* (5 Ap. Cas. 102), he is, unlike the Sovereign, liable to be sued in the courts of the colony for acts that are illegal and done in excess of his authority, still, he is something more than a mere part of the Colonial Constitution; he also represents the Imperial Government, and he is therefore free, in cases which seem to him to touch the Imperial interests, to act on advice other than that of his ministers. He may, for example, veto a Bill where, in an analogous case at home, the Sovereign would not be free to veto. He may, under the Colonial Office Regulations of 1892, obtain the advice of the Imperial law officers through the Secretary of State. But these exceptions arise out of a distinct reason—the inherent and necessary title of the Imperial Government to the decision of such questions as really concern the Empire generally, and for this purpose to have its interests watched over by its own representative Governor, who has thus a double duty to perform. So far as his position is merely that of Governor under a Constitution permeated by the usages of that British model after which it is fashioned, so far must he in every practicable case act upon the advice of his ministers. This at least has become true to-day, whatever may have been the case in those days of Sir George Bowen, in which the Colony of Queensland had only just received its separate Constitution.

I have dwelt on this topic as an illustration of the extent to which the Constitutions of our Colonies have of late years developed, after the very fashion of the general Constitution at home. Like the latter, they are really in the main unwritten. The Acts which constitute them are but the skeletons which the practice of governors, ministers, parliaments, and judges have to endow with flesh and blood before the dry bones can live. The process of endowment may be gradual. The stature of the living model is not attained at once. A set of constitutional and legal precedents has to be established in each case, and this takes time. Changes of view may and do occur; and this is because, even where the Acts of the Imperial Parliament calling our Colonial Constitutions into life are never so elaborate and precise, the true substance is unwritten. No stranger could make out the real position of, say, the Governor-General of Canada from the words of the British North America Act of 1867, any more than he could, in the illustration already given of the enacting words of an Imperial Statute, ascertain the real position to-day of the Queen. It

is not merely that the common form of the modern Colonial Constitution Acts confers on the Colonial legislatures large powers to alter the constitution conferred on them?—powers which, for example, were in a striking fashion exercised by Manitoba in 1876, when her Parliament abolished the Upper House of the Legislature, and her Governor decided that he was not even entitled to reserve the Bill, so clear was the constitutional right arising out of the principle of responsible government; it is because the British Constitution is in its essence neither rigid nor even written, and because every constitution which is modelled after it tends to resemble it in every point where the express provisions of an Imperial Statute do not stand in the way.

We may thus expect to find in the various forms of constitution which obtain throughout the Queen's dominions this process of silent approximation to the parent example manifesting itself. We shall expect to find this not less in the relationship to the home Government than elsewhere. For, subject always to this, that the home Government is and must remain charged with the burden of Imperial interests, and must act on its own initiative through the Governor who represents it in the colony, the relationship in all other respects of the Colonial Parliament, not only to its Governor, but through him to the Imperial Government and Parliament, must tend, whatever it is in the eyes of the theorist and the lawyer, to become in the eye of the statesman similar to that of the Imperial Parliament to the Crown. This is the direct and inevitable work of our familiar machinery of responsible government wherever put in operation; and its attainment can, under British traditions, never be more than a question of time. So complete does the growth become that there may even, in certain cases, as I will presently show, arrive a time at which courts of law can and do take cognisance of the developed relationship. Let us, in order to get the conception of this growth clear, begin by glancing at certain of the forms of government, outside Great Britain and Ireland, of the Queen's dominions.

The earliest of these forms in point of origin is that which one finds with varying characteristics in those constitutions of a feudal origin which obtain in the islands adjacent to Great Britain, Jersey and Guernsey (the latter, for this purpose, including Alderney and Sark), and the Isle of Man. The relationship of the Crown to the islanders, so far as the active business of government is concerned, has varied enormously. If it is using loose language to say that the monarchy has changed in these islands from an absolute to a limited one, it is at least approximately true. In Jersey, for example, a progress of charters, to which I have already referred, granting privileges to the people in consideration of the assistance rendered by them in successive wars with France, has helped materially towards the establishment of constitutional government. At last, in 1771, a code for this island was assented to by the Crown which is not the foundation, but one of the expressions, of its constitutional liberties. Under the provisions of this

code it was laid down that no laws or ordinances should be passed unless by the States or Parliament of the island. It was further provided that all warrants and documents manifesting the executive will of the Crown should be registered by the Royal Court of the island. It is not probable, in view of the decision of the Privy Council in 1894, already adverted to, that the home Government will nowadays refuse to recognise the right of the States to consider and give or refuse its assent to every projected law, whether it originates with the Crown or, as in future it is likely always to do, with the States. If Jersey—and the same thing is true of the other islands referred to—had been larger and more important and at a greater distance from London, there is little doubt that under this form of constitution she could have obtained for herself a freedom as complete as she could have gained under those parliamentary forms where, theoretically and in the eyes of a court of law, the Imperial Parliament can do everything, while constitutionally in local matters it can do nothing. What is interesting is that in the case of an appanage of the Crown, such as Jersey, tribunals of justice can do, what they cannot do where there is a so-called statutory constitution, take notice of the very important unwritten limitations on the theoretical powers of the Home Government, which remain binding so long as an Act of the Imperial Parliament is not invoked. Thus the validity of Orders in Council, which, so far as the Imperial Parliament was concerned, the Crown was free to make for the Channel Islands, has been impeached, and successfully impeached, before the Privy Council, on grounds which no court of law could have taken cognisance of had such a case arisen in regard to Canada or Australia. Of such cases some are reported in the Law Reports, while of others, not so reported, I have had personal cognisance in Channel Islands cases in which the Privy Council has treated constitutionality and legality as though, in dealing with the Constitution of these islands, they were equally within its capacity to notice.

A still more striking illustration of the capacity of a court of law to take notice of what, in its inception at least, seems to have been properly a constitutional restriction on the powers of the Crown arises in the case of the next form of Colonial Government, that of a Crown colony, where the privilege of holding a legislative assembly has once been granted by the Crown in its charter. In such a case Lord Mansfield, in a judgment the authority of which has never been questioned, held, in a common law action tried at the Guildhall in 1774,[1] that a court of law would treat the grant of the privilege of making laws in a representative assembly as irrevocable and exclusive, and would declare void a subsequent Order in Council purporting to levy a tax. Of course Parliament could have validly legislated, but the point was that the ordinary and natural paramount authority was held to have committed legal as well as constitutional suicide, and put itself in the position of being unable to recall its own Act. The

[1] *Campbell* v. *Hall* (1 Cowper 204; 20 State Trials 239).

constitutional reason for this it is easy to see; the legal reason is much more obscure. But there it stands established by great authority that such legal reason exists.

I turn now to the ordinary type of statutory constitution established in the most important portions of the Empire by Act of the Imperial Parliament, where the right of self-government granted is of responsible as well as representative government. Here the courts confine what they take cognisance of to the provisions of the Statute. The Imperial Parliament they of course treat as supreme, and where the language of the Statute leaves the Crown nominally free to act on its own initiative, the courts decline to take notice of these constitutional restrictions on the exercise of that power which we all know to exist. But these constitutional restrictions have other than legal sanctions, and they have become much more definitely recognised, as the theory of Colonial Government has developed during the last quarter of a century. A striking case of the manifestation of a desire that they should exist in full force is to be found in the preamble to that British North America Act of 1867 which gave Canada her present Federal Constitution, and which I take to mean that the statutory framework was meant to be filled up from the store-house of unwritten tradition. "Whereas," so runs the preamble to the Statute, "the Provinces of Canada, Nova Scotia, and New Brunswick have expressed their desire to be federally united into one dominion under the Crown of the United Kingdom of Great Britain and Ireland, with a Constitution similar in principle to that of the United Kingdom." The Act goes on to declare that the executive power of the Government of the Dominion is vested in the Queen, to establish a Privy Council for Canada, which is to advise the Governor-General, to constitute a Parliament for Canada, to set constitutions for the provinces, and to distribute legislative powers under the famous 91st and 92nd sections between the Dominion and Provincial Parliaments, conferring, however, on the Dominion Parliament the general common form power of making laws for the peace, order, and good government of Canada, and reserving to it all powers not expressly given to the Provincial Parliaments. Now from the very first the words which I have quoted from the preamble made it clear that in the Constitution of Canada the Crown, except as regards Imperial matters, which were not delegated, and to which that Constitution consequently did not extend, was intended to be in just the same position towards the Canadian Parliament in point of constitutional usage as is the Crown to Parliament at home. Not only responsible government, but responsible government free from interference from Downing Street, was intended to be granted so far as purely Canadian affairs were concerned. That this was no small matter will be realised quickly by any one who consults the learned work of the late Mr. Todd, the Librarian of the Canadian Parliament, who has written a treatise on Parliamentary Govern-

ment in the Colonies of an authority which places it alongside of that of Sir Erskine May's great home book. One has only to contrast the principles laid down in the despatches from Lord Carnarvon and his successors to the Canadian Governors-General with those written from Downing Street by the Duke of Newcastle only seven years previously, to see how remarkable was the advance recognised. Besides what the preamble expresses, and what, though not new or necessary to be expressed now in any analogous case, was new in 1867, there was another remarkable feature about the Act of 1867.

Not only is the power of giving or withholding the Royal Assent to Bills passed by the Provincial Legislatures and Lieutenant-Governors conferred on the Governor-General, but by ss. 58 and 59 the appointment and dismissal of the Lieutenant-Governors themselves were placed with the Governor-General, as distinguished from Her Majesty in person. Now this is a remarkable provision, for a reason which I will point out. Soon after the Act passed, the Supreme Court of Canada—which was established with a view to obtaining an interpretation of the Constitution upon the spot, and which has done much valuable work of this kind—began to show a tendency in its judgments which caused suspicion and friction in the Provinces. This court laid stress on those provisions in the Act which seemed to point to the principle of union of the Provinces, and they laid down principles which if accepted would have placed the Provinces in the position of subordinate governments. A series of questions emerged sharply, of such delicacy that it was essential that they should be decided by an arbiter holding an absolutely even hand between the contending parties, and simply interpreting the words of the Dominion Act in the light of that British Constitution which its object was to reproduce. Such an arbiter was found in the Imperial Privy Council. A series of cases was presented to it, some by way of appeal from the Supreme Court of Canada, and some by way of special reference under special Acts passed concurrently by the Dominion and Provincial Parliaments. In the end the Privy Council settled that the true view of the Act was that it established a federal distribution of not only legislative but executive powers, and that in the matters delegated to them the Provincial Governments had an authority as high as that of the Central Government. The relationship was, in other words, held to be one of strict co-ordination, and that in executive as well as legislative matters. On this principle one burning conflict after another was stilled. The control of the liquor laws, the limits of direct taxation, the Government titles to gold and silver, the right to appoint Queen's Counsel, the control of the fisheries in the great lakes and rivers, the exact provincial boundaries, the adjustment of debt,—these and many other issues were peacefully resolved as between the Dominion and the Provinces. But while to the legal principle of construction which the Privy Council

established there is no real exception, a remarkable exception to the constitutional principle has, by the combined operation of the language of the Act and of the usages which it imported, been created in regard to that office of Lieutenant-Governor to which I have adverted. In the eye of the courts the Lieutenant-Governor of a Canadian province, when appointed, holds directly from the Crown and exercises, where necessary, on provincial advice, all prerogative powers within the scope of the Provincial Constitution. The distribution of executive power is federal. But under ss. 58 and 59 of the British North America Act the power to appoint and dismiss every Lieutenant-Governor rests with the Governor-General. Accordingly, when the majority of the Dominion Parliament and the Dominion Ministry desired to dismiss Mr. Letellier, the Lieutenant-Governor of Quebec, although supported by a majority in the Provincial Parliament, the Home Government advised Lord Dufferin, the Governor-General, that he must act on the request of his Dominion Ministers if pressed.

The Constitution of Canada sprang at once into full life and vigour because the Imperial Parliament was in 1867 simply giving effect to exhaustive resolutions passed by the federating provinces. The South Africa Act of ten years later, which proceeded on no such definite impulse from within, was stillborn. There is, indeed, another reason why it is not likely ever, as originally framed, to come to life. It was in the main a mere copy of the Canadian Act. Now the Canadian Act has been, between the Supreme Court of Canada and the Judicial Committee of the Privy Council, interpreted with a view to the circumstances of Canada. The (relatively to the Central Government) absolutely equal authority and status which has been attributed by the decisions of these tribunals to the Provincial Governments is an illustration of this. If the similar language of the South Africa Act had to be applied, it would, however, inevitably be found that the courts were hampered in their interpretation of it by the tradition which had grown up under Canadian decisions, and the Constitution it established would probably prove to be unfit for South Africa as it is to-day. From this danger the latest and most interesting example of a constitution framed after the British model for a distant but great portion of the Queen's dominions has been happily, in large measure, delivered. The Australasian Commonwealth Bill, so much in the minds of all of us at this moment, is the outcome of no scheme elaborated in Downing Street, but of the deliberations of Australasian statesmen conferring on the spot. Like the scheme worked out by a similar process for Canada, a scheme from which it is not unnatural that it should differ in very important respects, it proposes to do much more than establish a statutory Colonial Constitution of the old-fashioned type. Of the constitution contemplated by the Commonwealth Bill it is not too much to say what was said by a distinguished Canadian lawyer, Mr. Justice Gwynne, in delivering judgment in the Supreme Court

in the case of *The Maritime Bank* v. *The Queen* (4 Cartwright 421): "We make a very great mistake if we treat the Dominion of Canada, constituted as it is, as a mere colony. The aspirations of the founders of the scheme of confederation will, I fear, prove to be a mere delusion if the Constitution given to the Dominion has not elevated it to a condition much more exalted than, and different from, the condition of a colony, which is a term that, in my opinion, never should be used as designative of the Dominion of Canada." If by "colony" the learned judge meant a part of the Empire where there is a mere delegation for local purposes of Imperial authority, constitutionally alterable without consultation of the inhabitants, a mere stage in advance of the old-fashioned plantation, his words are clearly true. One aspect, at least, of the view for which he was contending finds confirmation in the words used by Lord Selborne about a case which falls far short of the level of constitutional government reached in Canada—the case of the Legislature of India. In his judgment in the Privy Council in *The Queen* v. *Burah* (3 Ap. Cas. 904) Lord Selborne said: "The Indian Legislature has powers expressly limited by the Act of the Imperial Parliament which created it, and it can, of course, do nothing beyond the limits which circumscribe these powers. But when acting within those limits, it is not in any sense an agent or delegate of the Imperial Parliament, but has, and was intended to have, plenary powers of legislation as large and of the same nature' as those of Parliament itself."

Time will not permit me to linger over the topic, fascinating to a constitutional lawyer, of the novel and original scheme of the Australasian Commonwealth. I can only draw attention to one or two of its features. In the first place s. 51 limits the power of the Federal Parliament to make laws to certain very important, but none the less restricted and defined, matters, giving this Parliament no general legislative powers. In this point the Bill approximates more nearly to the precedent of the United States Constitution than to that of Canada, which gives general powers to the Dominion Parliament and only specified powers to the Provincial Legislatures. Indeed, the scheme of the Australasian proposals, as disclosed by the very words of s. 106, is to leave the State Constitutions as they are at present, only subtracting from them such powers as are necessary for the erection of the Federal Constitution. This section is followed up by the 109th, which provides that, in case of a conflict of laws, those of the new Commonwealth are to prevail. There is no such express provision in the Canadian Act; but the Privy Council has decided, in *Union Bank* v. *Tennant* (1894 Ap. Cas. 31) and other cases, that it is implied. There is no provision, such as gave rise in Canada to the constitutional dispute over the Letellier case, enabling the Governor-General of the Commonwealth to appoint the State Governors. Such a provision would, indeed, have been hardly consistent with the scheme of the new Constitution, which is to leave State rights intact

except where expressly interfered with. S. 70 provides for a federal distribution of executive power. SS. 53 to 56 inclusive enact and make written provisions, most of which exist similarly in the parent British Constitution, but are there unwritten. S. 57 contains an ingenious and novel provision for reconciling the two Houses of Parliament in case of serious differences by making them, but not until after a dissolution, vote together. The final section of the Bill provides for the alteration of the Constitution and for the preservation, in a decision on such alteration, of State rights by means of a submission of the new law to the electors in each State. The analogy to the United States Constitution stops very soon. The American Constitution knows but little of what we Britons mean by "responsible government." It makes the Executive in a large measure independent of the Legislature. But the Australasian Commonwealth Constitution breathes in every clause the spirit of true responsible government. The Executive really flows from, and is controlled by, the Legislature in this as in any constitution of the British type. Truly it looks as though a man-child were about to be born of the Imperial Parliament.

I have indicated the fashion in which the functions of the Crown and of the Colonial Governors have by degrees become circumscribed by the silken bonds of constitutional usage. I have sketched what, in other words, may be described as the operation of responsible government in cutting down the prerogative, and in making local the advice upon which it is to be exercised. But there is another tendency which is equally apparent. The Imperial Parliament does not coerce her children. The bonds of empire are the bonds, not of any law, written or unwritten, but of a common heritage of history, of interest, and of blood. The result is that the problem of when the Imperial Parliament is justified in interfering is getting to be a more and more deliberate one. Fortunately it rarely arises; and I am convinced that it will arise yet more rarely as soon as the people of those distant dominions of the Queen where our Constitution has been reproduced realise that there is no desire to interfere with their absolute right of autonomy in their own concerns, but only an aspiration to keep the Empire together, and to pervade its institutions with a spirit that is imperial in the noblest sense. For the existence of the existing Constitution of the Empire I am persuaded that it is desirable, and indeed essential, that the Home Parliament should remain in theory and in law supreme. Constitutionally we are all getting to understand how this relationship of the mother to her children is tempered. No doubt it would be possible for the Imperial Parliament to renounce this supremacy, to delegate some authority to Colonial Legislatures, and the rest to a purely British Legislature. She might put herself, so to speak, to sleep, and the Parliaments which had taken her place would be co-ordinate only, like the legislatures which exist side by side in Canada, and are to do so in the

coming Commonwealth of Australasia, with no supreme authority among them. Any one who desires to see how as a matter of law this could be done has only to turn up the chapter in *England's Case against Home Rule*—the ingenious book written by Mr. Dicey on Mr. Gladstone's Irish proposals of 1886. Mr. Gladstone's Bill was not intended to do anything of the kind, whatever its language may have suggested to Mr. Dicey. But he has shown how the thing can be done. Now I have always disliked the words "Imperial Federation" just for this reason. It is all very well to use the word "federation" when you are speaking of the consolidation into a dominion or commonwealth of a group of derivative constitutions, such as those of which I have been speaking in British North America and Australasia; but is it appropriate to use it of any conceivable relationship between the Imperial Government as the keystone of our Empire, as it is now, and what are called the Colonies? You could create a federation of the Imperial and Colonial Governments, no doubt; but in creating it you would, if you followed the principle which the word implies, break up the Constitution of the Empire and substitute—at least so I think—what would in the main be a rigid and inelastic constitution for the unwritten and developing one which has so far worked well. The ideal of Imperial Federation is a fine ideal; but I think it will have to be attained by other means than federation in the legal sense. While the Imperial Parliament remains legally supreme, and consequently a most useful tool for effecting ends in which all concerned have concurred, we are rapidly recognising that it is constitutionally bound so far as the Colonies are concerned, just as the Crown has recognised that it is itself analogously constitutionally bound. The real meaning of the new doctrine of continuity in external policy seems to me to be the recognition that in foreign and Colonial affairs Parliament is a trustee of its powers not only for the electors of Great Britain and Ireland, but for the Empire at large. More and more do successive Parliaments seem to tend to be guided by the ministers of the day in their proceedings with regard to these Foreign and Colonial affairs. The constituencies at home are beginning to recognise this. I am certain that those whom I myself represent would rebuke me for disloyalty to the principles of representative and democratic government if I asked them at an election to let a party issue be raised about the policy of our Parliament with regard to, say, the internal government of Australasia. This, they would point out to me, is by your own principles for Australasia herself, and your business as representing us is merely to see that the Colonial Office, in applying to the Imperial Parliament for powers, is acting in accordance with Australasian wishes.

In the nature of things all this must become yet more apparent. It will inevitably be accompanied by closer and more frequent consultations between the Queen's Ministers in London and the Queen's Ministers in the other and more distant parts of her dominions. Some form of

council may grow up, some form even of representation in our common Parliament. But it is not the machinery that matters: indeed, the less we have of it, in all probability the better. What is wanted is such a sense of responsibility and constitutional usage, checking the hasty exercise of legal power on the part of the Houses of the Imperial Legislature, as shall make its relationship to the distant subjects of the Crown become as easy as is that of the Crown itself. This appears to be the true notion of a closer Imperial connection, a connection the form of which it is useless to try to define in advance or express in terms of abstract principles. Events in the past have so ordained it that the centre of the Empire is London, and not Sydney, nor Ottawa, nor Capetown. If the past had been different, this too might have been different. If the Empire continues to cohere, it may still be otherwise. Who can say that at some future period the metropolis of the British people will not be found at some spot to-day reckoned remote, but then become the centre? What is important is that, come what changes may, the unity of our race and of that link which is its precious possession should never be impaired or lost sight of.

And this leads me, in conclusion, to say a few words about a topic which, I cannot but think, appears more thorny than it really is.

The inevitable outcome of the growing importance and magnitude of the more distant parts of the Queen's self-governing dominions is that they will more and more rely on their own tribunals for the administration of justice. This is as it ought to be. It is a tendency implied in the very notion of self-government, in that very power of making laws for peace, order, and good government which is the common form of the instruments under which our fellow subjects beyond the seas rule themselves under the Queen's flag. But there is a class of question, a class small in number, but large in importance, which reaches beyond the analogy of ordinary litigation. Some of the questions which belong to this class concern the ascertainment of the true principles which underlie the type of British Constitution, unwritten as much as written, under which all of us who are subjects of the Sovereign live. Some others of such questions concern topics such as the great principles of that system of Common Law, itself elastic and developing, which is our common heritage. In an Empire such as ours surely there is room for a great and final arbiter, a tribunal chosen not from one locality nor from one people, but selected from the best brains of the various peoples and various localities which compose that Empire, a tribunal to which appeal might be made in last resort for the sake of uniformity in great and governing principles. The institution of such a tribunal seems to grow, almost as of necessity, out of our common Constitution. It should be invoked, not frequently nor as of course, but only on grave occasions of general interest. It would not interfere with the finality in ordinary cases of the judgments delivered by the various High Courts of Appeal in or out of England;

but it would remain as a unifying influence, a bond corresponding in judicial matters of Imperial importance to the unifying influence where Imperial interests are touched, of the executive powers of the Crown. It is not difficult to conceive a Court of Imperial Justice, such that the Empire as a whole would be proud of it, as the greatest of ancient or modern times, and would feel its rule a benefit and no burden.

But this is a speculation lying beyond the scope of a paper which has already become too long; and I have only touched on it because it seemed to me that no discussion such as that which has engaged us this afternoon would have been complete without a reference to it.

Printed by Hazell, Watson & Viney, Ld., London and Aylesbury.

Author Haldane of Cloan, Richard Burdon Haldane, 1st Viscount

Title Federal Constitutions within the Empire.

DATE.	NAME OF BORROWER.
26/6/46.	James Butterfield (Stud.)
Nov. 28/46	J. Rowell Grant.